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IN THE

Supreme Court of the United States

SAMUEL WAKSAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should *Booker v. United States* be applied retroactively to cases on collateral review, particularly where the defendant plead guilty without a plea agreement and without admitting to any sentencing facts, thus allowing the judge to impose all the enhancements based on a preponderance of the evidence standard.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished order of the Court of Appeals for the Second Circuit, denying the motion for reconsideration of the Certificate of Appealability is reprinted at App. 1. The unpublished order of the Court of Appeals denying the Certificate of Appealability is reprinted at App. 2. The unpublished order of the District Court for the Southern District of New York, deying the motion pursuant to 28 U.S.C. § 2255, and denying a Certificate of Appealability is reprinted at App. 5.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 18, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> no person shall . . . be deprived of life, liberty, or property, without due process of law. . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

STATEMENT OF THE CASE

In October 2002, Dr. Samuel Waksal, a dedicated scientist and cancer researcher, and the founder of ImClone Systems Incorporated, plead guilty to conspiracy and to securities fraud. Dr. Waksal did not enter into a plea agreement with the government. Consequently, he never agreed to any enhancements under the federal Sentencing Guidelines or to any particular sentencing range. Nor did he waive his right to challenge the ultimate sentence.

On June 10, 2003, the District Court for the Southern District of New York sentenced Dr. Waksal to a term of imprisonment of 87 months. The District Court, at the time, was *required* to impose a sentence pursuant to the federal Sentencing Guidelines. The Court was compelled to impose every enhancement under the Guidelines supported by a preponderance of the evidence and, after calculating the Guidelines sentence, could not deviate unless there were extraordinary circumstances that warranted a departure. The factors the Court could consider in determining whether to depart were circumscribed by the Guidelines themselves. Most factors unique to the individual could *not* be considered in deciding whether to impose a sentence within the Guidelines range or to depart from that range.

Because his sentence was within the Guidelines range (albeit at the top end), given the state of the law at the time, Dr. Waksal did not appeal. He is currently serving his sentence.

On June 24, 2004, after Dr. Waksal was sentenced, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), which held that a state court may not, consistent with the Constitution, impose a sentence in excess of the statutory maximum on the basis of facts not found by the jury beyond a reasonable doubt.

Six months later, on January 12, 2005, this Court decided *United States v. Booker*, 543 U.S. 220 (2005). Though sharply divided, resulting in two separate majority decisions, the "remedial" majority decision severed as unconstitutional the provisions of the federal Sentencing Guidelines that made application of the Guidelines "mandatory," and held that sentencing courts *must* consider, in addition to the Guidelines, the other factors set forth in 18 U.S.C. § 3553(a).

On March 29, 2005, Dr. Waksal moved to vacate set aside or correct his sentence pursuant to 28 U.S.C. § 2255 contending that his sentence, given the unique circumstances of his case (no plea agreement and no agreement on sentencing facts), was "imposed in violation of the Constitution" because: (1) it was imposed pursuant to an unconstitutional statute that mandated application of the Sentencing Guidelines and that prohibited the sentencing court from considering the legislative factors that the remedial *Booker* opinion held must be considered; and (2) his sentence was increased above the "statutory maximum" based on findings of fact made by the sentencing judge using a preponderance of the evidence standard in violation of both the Fifth and the Sixth Amendments.

On October 26, 2005, the District Court, relying on *Guzman v. United States*, 404 F.3d 139 (2d Cir. 2005), denied

Dr. Waksal's Section 2255 motion, ruling that *Booker* was not retroactive. At the same time, the District Court also denied a Certificate of Appealability.

Dr. Waksal appealed and sought a Certificate of Appealability from the Second Circuit. By Order dated June 6, 2006, the Second Circuit denied his request.

On June 5, 2006, this Court granted certiorari in *Burton v. Waddington*, 142 Fed. Appx. 297 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2352 (U.S. June 5, 2006) (No. 05-9222), to decide whether *Blakely* should be applied retroactively. In light of the grant of certiorari in *Waddington*, on June 27, 2006, Dr. Waksal petitioned the Second Circuit for rehearing of the denial of his request for a Certificate of Appealability. The Second Circuit denied that request for rehearing on October 18, 2006.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DECIDE THE IMPORTANT QUESTION WHETHER *UNITED STATES V. BOOKER* IS RETROACTIVE

This Court's trio of sentencing decisions, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), have engendered confusion about whether they implicate only the Sixth Amendment right to a jury, or whether they also are grounded in the Fifth Amendment due process right to have factual findings made beyond a reasonable doubt. The distinction is critical: whether a fact is found by a judge or a jury may not be essential to accurate fact-finding, but the standard of proof is. Consequently, any analysis of the retroactivity of *Booker* must involve a determination of whether these cases implicated the Fifth Amendment. Dr. Waksal is seeking certiorari on this open question.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt*." *Id.* at 490 (emphasis added). Four years later, in *Blakely v. Washington*, 542 U.S. 296 (2004), the Court, correcting a unanimous misinterpretation of *Apprendi* by the lower courts, held that "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04.

In *United States v. Booker*, 543 U.S. 220 (2005), the "merits" majority concluded that *Blakely* (and *Apprendi*) applies with full force to the federal Sentencing Guidelines:

> Accordingly, we reaffirm our holding in *Apprendi*. Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant *or proved to a jury beyond a reasonable doubt*.

543 U.S. at 243 (Stevens, J.) (emphasis added). Because, under the Guidelines, courts were *required* to make findings of fact that resulted in sentences that exceeded the maximum authorized by the facts found by the jury beyond a reasonable doubt, the "remedial" majority "excised" the provision of the federal sentencing statute that made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1). *Id.* at 245-46. (Breyer, J.)

On June 5, 2006, the Court granted certiorari in *Burton v. Waddington*, 142 Fed. Appx. 297 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2352 (U.S. June 5, 2006) (No. 05-9222), to decide whether *Blakely v. Washington*, 542 U.S. 296 (2004), is retroactive to cases on collateral review. *Burton* has been fully briefed and was argued on November 7, 2006.

Just recently, the Court granted certiorari in two cases that address how *Booker* has been applied by the lower courts:

Rita v. United States, 177 Fed. Appx. 357 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (U.S. Nov. 3, 2006) (No. 06-5754), to resolve whether a Guidelines sentence is presumptively reasonable, and, if so, whether the presumption can justify a sentence imposed without reference to the other 18 U.S.C. § 3553(a) factors; and *Claiborne v. United States*, 439 F.3d 479 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (U.S. Nov. 3, 2006) (No. 06-5618), to resolve when, and what circumstances must be present, for the district court to impose a below-Guidelines sentence.

The Court's resolution of these pending cases will undoubtedly shed light on the meaning of the *Apprendi-Blakely-Booker* line of cases. Most importantly, the decisions in these pending cases should clarify the constitutional underpinnings of the *Apprendi-Blakely-Booker* rule, as well as the precise role of the Guidelines in a post-*Booker* sentencing world.

This Court's decision to revisit the *Blakely* and *Booker* decisions is welcome because, since *Booker*, the Circuits have been united in their determination to limit its scope. Most have held that *Booker* implicates only the Sixth Amendment right to a jury trial. Then, relying on this Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the courts have concluded that *Booker* is not retroactive. *See, e.g.*, *Cirilo-Munoz v. United States*, 404 F.3d 527 (1st Cir. 2005); *Guzman v. United States*, 404 F.3d 139 (2d Cir.), *cert. denied*, 126 S. Ct. 731 (2005); *Lloyd v. United States*, 407 F.3d 608 (3d Cir.), *cert. denied*, 126 U.S. 288 (2005); *United States v. Gentry*, 432 F.3d 600 (5th Cir. 2005); *Humphress v. United States*, 398 F.3d 855 (6th Cir.), *cert. denied*, 126 U.S. 199 (2005); *McReynolds v. United States*, 397 F.3d 479 (7th Cir.), *cert. denied*, 545 U.S. 1110 (2005); *Never Misses A Shot v. United States*, 413 F.3d 781 (8th Cir. 2005); *United States v. Bellamy*, 411 F.3d 1182 (10th Cir. 2005); *Varela v. United States*, 400 F.3d 864 (11th Cir.), *cert. denied*, 126 S. Ct. 312 (2005).

But unanimity does not equate with validity, and the lower courts, we submit, are again wrong, just as they were wrong in the rigid manner in which they first read *Apprendi* and then *Blakely*.[1] The courts have failed to appreciate the complex constitutional principle announced in *Apprendi-Blakely-Booker*. There are at least three reasons why *Booker* deserves retroactive application.

First, the question of retroactivity only arises if *Booker* announced a "new rule," that is, "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion). And *Blakely* and *Booker* were "dictated" by *Apprendi*. In *Blakely*, the Court observed that it was "apply[ing] the rule . . . expressed" in *Apprendi*. Justice O'Connor, in her dissent, reinforced this understanding, noting that, because *Blakely* was "dictated" by *Apprendi*, it likely would apply to defendants who were sentenced after *Apprendi*, even if their direct appeals had concluded. *Id.* at 323 (O'Connor, J., dissenting). If *Blakely* left any doubt on this question, Justice Stevens laid it to rest in *Booker*, emphasizing that the constitutional principle announced in

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[1] Before *Booker*, the courts had held, erroneously, that *Apprendi* did not apply to enhancements under the federal Sentencing Guidelines that did not result in a sentence above the statutory maximum. *See, e.g.*, *United States v. Baltas*, 236 F.3d 27 (1st Cir.), *cert. denied*, 532 U.S. 1030 (2001); *United States v. Garcia*, 240 F.3d 180 (2d Cir.), *cert. denied*, 533 U.S. 960 (2001); *United States v. Williams*, 235 F.3d 858 (3d Cir. 2000), *cert. denied*, 534 U.S. 818 (2001); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001); *United States v. Corrado*, 227 F.3d 528 (6th Cir. 2000); *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000), *cert. denied*, 534 U.S. 832 (2001); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000); *United States v. Hernandez-Guardado*, 228 F.3d 1017 (9th Cir. 2000); *United States v. Heckard*, 238 F.3d 1222 (10th Cir. 2001); *United States v. Gerrow*, 232 F.3d 831 (11th Cir. 2000), *cert. denied*, 534 U.S. 830 (2001).

Booker—that any fact that increases a sentence above the statutory maximum must be found by a jury beyond a reasonable doubt—flowed directly from *Apprendi* and other prior precedent. *Booker*, 543 U.S. at 748.

Second, even if *Booker* announced a "new rule," it is a substantive rule. Substantive rules must be applied retroactively because "they necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)).

Booker declared unconstitutional the most critical component of the federal sentencing statute—the mandatory application of the Guidelines—and then created a new sentencing structure that fundamentally changes how sentences are to be imposed. Generally, when the Court interprets a statute to fundamentally change its meaning, the decision *is* applied retroactively. *See, e.g.*, *Bousley*, 523 U.S. at 620-21 (holding that "using" a firearm requires the government to prove "active employment" of the firearm is substantive and retroactive). The *Booker* "remedy" decision fundamentally altered how punishment is imposed in federal criminal cases. It is difficult to conceive of a more significant change in the federal sentencing system.

Third, and most importantly for purpose of this Court's review, assuming *Booker* constitutes a procedural rule, it fits within the class of constitutional principles so fundamental to the fairness of the proceedings that retroactive application is required. A new "procedural" rule will be applied retroactively if it constitutes a "watershed rule" that is "necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990).[2] *Apprendi-*

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[2] During the oral argument in *Whorton v. Bockting*, 126 S. Ct. 2017 (U.S. Nov. 1, 2006) (No. 05-595) (addressing the retroactivity of *Craw-*

Blakely-Booker is just such a rule, involving the application of two separate constitutional rights: a defendant's right to a jury determination of certain sentencing facts, and, equally important, the defendant's right to have those facts proven beyond a reasonable doubt.

This Court has long made clear that a rule that involves the application of the reasonable doubt standard is so fundamental to the criminal justice system, it mandates retroactive review. *Hankerson v. North Carolina*, 432 U.S. 233 (1977) (rule which invalidates presumption that shifts burden of proof must be applied retroactively); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Ivan V. v. City of New York*, 407 U.S. 203 (1972) (decision requiring proof beyond a reasonable doubt in juvenile proceedings must be applied retroactively); *In re Winship*, 397 U.S. 358 (1970).

Schriro, therefore, is not controlling. There, the question involved the retroactivity of *Ring v. Arizona*, 536 U.S. 584 (2002), which invalidated a system where a judge, and not a jury, made the findings of aggravating circumstances necessary to impose the death penalty. This Court held that *Ring* did not establish a watershed rule because there is no overwhelming consensus that juries are more accurate fact-finders than judges. But, in *Ring*, the judge had to make the findings *beyond a reasonable doubt*. Thus, as the Court

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ford v. Washington, 541 U.S. 36 (2004)), the Chief Justice questioned whether the *Teague* "watershed" rule survives 28 U.S.C. § 2254(d)(1), which precludes federal habeas relief unless a state court's adjudication of the petitioner's claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." This same concern was raised during the argument in *Burton*. There is no counterpart in the federal habeas statute, 28 U.S.C. § 2255, that circumscribes federal court review of federal criminal convictions. Consequently, *Teague* is not inconsistent in any way with the federal statute and that question is not present in evaluating the retroactivity of *Booker*.

expressly noted, "that aspect of *Apprendi* was not at issue." 542 U.S. at 350 n.1.[3]

This Court should address whether *Booker* is retroactive, and should do so in this unique case, involving a defendant who agreed to plead guilty without an agreement and without any agreement as to the facts that would impact on his sentence. Dr. Waksal's case presents the *Apprendi-Blakely-Booker* constitutional dilemma in its purest form: his sentence entirely was driven by judicial fact-finding *mandated* by the Guidelines and based on the least rigorous standard of proof—a preponderance of the evidence. In short, his sentence was imposed under an unconstitutional statute, based on unconstitutional standards, and in the face of his opposition to the imposition of enhancements required by the Guidelines.

The constitutional underpinnings of *Booker* must be clarified. As the Court is aware, the decision implicates the sentences of thousands of federal prisoners. Questions about a sentencing court's constitutional power to engage in fact finding at sentencing, and what standard of proof is necessary pervade the federal criminal justice system. The retroactivity question should be addressed by this Court so that those involved in the criminal justice system receive a dispositive ruling on this extraordinarily important question.

Finally, though the issues are not identical, resolution of the question in *Burton* undoubtedly will impact on the retroactivity question presented in Dr. Waksal's case. Consequently, should this Court not agree that Dr. Waksal's case

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[3] The decisions by the lower courts ignoring this distinction have been heavily criticized. *See generally* Note, *Rethinking Retroactivity*, 118 Harv. L. Rev. 1642, 1663-64 (March 2005) (arguing for retroactivity and noting that the courts have ignored the focus in *Schriro* on accuracy in fact-finding process and that *Apprendi* and its progeny impacts on fact-finding accuracy because it requires reasonable doubt determinations).

provides an excellent vehicle for addressing the important issue of *Booker*'s retroactivity, Dr. Waksal alternatively asks that his Petition be held until disposition of *Burton v. Waddington*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 5, 2006

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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05 Civ. 3378 (WHP)

SAMUEL WAKSAL,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM ORDER

WILLIAM H. PAULEY III, *District Judge*:

Petitioner Samuel Waksal ("Waksal") pled guilty in October 2002 and March 2003 to charges of securities fraud, bank fraud, wire fraud, conspiracy to commit wire fraud, obstruction of justice, perjury and conspiracy to obstruct justice and commit perjury. Waksal did not enter into a plea agreement with the Government. Thus, Waksal neither stipulated to a particular sentencing range under the Federal Sentencing Guidelines (the "Guidelines") nor waived his right to challenge the sentence imposed. On June 10, 2003, this Court sentenced Waksal to 87 months of imprisonment. Waksal did not appeal.

On March 29, 2005, Waksal filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Relying on *United States v. Booker*, 125 S. Ct. 738 (2005), Waksal contends that this Court violated his Sixth Amendment right to a jury trial by making its own findings of fact and sentencing him under the Guidelines. However, under the Second Circuit's intervening decision in *Guzman v. United States*, 404 F.3d 139 (2d Cir. 2005), *Booker* is inapplicable to

collateral challenges such as this. Waksal's motion is therefore denied. Acknowledging *Guzman*, Waksal requests a certificate of appealability to re-present the issue to the Court of Appeals. For the reasons set forth below, Waksal's request is denied.

I. *Waksal's Section 2255 Motion*

In *Booker*, the Supreme Court held that the Sentencing Reform Act (the "Act") raised Sixth Amendment concerns to the extent it required a sentencing court to make findings of fact and impose a sentence within the corresponding Guidelines range. *Booker*, 125 S. Ct. at 749-56. Specifically, the Court held, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 125 S. Ct. at 756. To remedy the constitutional infirmity in the then-existing sentencing regime, the Court severed and excised the provision of the Act that mandated application of the Guidelines. *Booker*, 125 S. Ct. at 764. The Court left the balance of the Act intact. As such, the Guidelines are advisory; sentencing courts are required "to take account of the Guidelines together with other sentencing goals" in fashioning an appropriate sentence. *Booker*, 125 S. Ct. at 764; *accord United States v. Crosby*, 397 F.3d 103, 111 (2d Cir. 2005) ("[S]entencing judges remain under a duty with respect to the Guidelines – not the previously imposed duty to apply the Guidelines, but the continuing duty to 'consider' them, along with the other factors listed in [18 U.S.C. §] 3553(a).").

Booker extends to "all cases on direct review" but leaves unresolved its retroactive application, if any, to criminal judgments that were final at the time it was decided. *Booker*, 125 S. Ct. at 769. "Whether or not a new rule of law announced by the Supreme Court is to be applied retroactively in criminal cases on habeas review . . . depends

largely on whether the rule is substantive or procedural." *Santana-Madera v. United States*, 260 F.3d 133, 138 (2d Cir. 2001). New substantive rules presumptively apply to habeas petitions, whereas new procedural rules are retroactive only if they constitute "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 2523 (2004) (internal quotations omitted); *see Teague v. Lane*, 489 U.S. 288, 310-12 (1989); *Coleman v. United States*, 329 F.3d 77, 83 & n.4 (2d Cir. 2003). "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished. This class of rules is extremely narrow, and it is unlikely that any has yet to emerge." *Schriro*, 124 S. Ct. at 2523 (internal quotations, alteration and citation omitted).

Waksal contends that *Booker* applies retroactively to Section 2255 proceedings because: (1) the *Booker* rule is not a new rule but was dictated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (2) even if a new rule, it is substantive rather than procedural; and (3) even if a new procedural rule, the *Booker* rule emerges as a watershed rule of criminal procedure.

Subsequent to Waksal's motion, the Second Circuit decisively rejected these very arguments in *Guzman*. 404 F.3d at 141-44. The Court of Appeals explained that although Booker announced a new rule because the result was not "apparent to all reasonable jurists," the rule was not substantive because it "did not alter the range of conduct subject to any sentence." *Guzman*, 404 F.3d at 142 (internal quotation omitted). Moreover, the Court held that Booker's new procedural rule was not "a watershed rule because 'the only change is the degree of flexibility judges enjoy in applying the guideline system.'" Guzman, 404 F.3d at 143 (quoting *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005)). Accord-

ingly, the Court held that "*Booker* is not retroactive, *i.e.*, it does not apply to cases on collateral review where the defendant's conviction was final as of January 12, 2005, the date that *Booker* issued." *Guzman*, 404 F.3d at 144.

According to the docket sheet, Waksal's judgment of conviction was entered on June 12, 2003. Waksal had ten days within which to file a notice of appeal, *see* Fed. R. App. Proc. 4(b)(1)(A), or until June 26, 2003. Because Waksal's conviction was final on that date, *Guzman* forecloses his collateral challenge to this Court's sentence. *See Moshier v. United States*, 402 F.3d 116, 118 (2d Cir. 2005) ("[F]or purposes of § 2255 motions, an unappealed federal criminal judgment becomes final when the time for filing a direct appeal expires.").

Accordingly, Waksal's motion for Section 2255 relief is denied.

II. *Certificate of Appealability*

Anticipating that this Court would deny his motion in light of *Guzman*, Waksal requests a certificate of appealability "to keep [his case] in the pipeline of cases headed to the Supreme Court" that urge a retroactive application of *Booker*. (Letter to the Court from Abbe David Lowell, Esq., dated June 13, 2005, at 1; *see also* Petitioner's Reply Memorandum, dated May 12, 2005 ("Pet. Reply Mem.").)

A petitioner proceeding under Section 2255 may not pursue his motion to the Court of Appeals without first obtaining a certificate of appealability from the District Court, the Court of Appeals or the Circuit Justice. Fed. R. App. Proc. 22(b); 28 U.S.C. § 2253(c)(1)(B); *Eltayib v. United States*, 294 F.3d 397, 398 (2d Cir. 2002). A certificate of appealability should issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner meets this burden by demonstrating "that reasonable jurists could debate whether (or, for that matter, agree

that the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and alteration omitted); *accord Love v. McCray*, 413 F.3d 192, 195 (2d Cir. 2005); *Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 112 (2d Cir. 2000).

Waksal submits that reasonable jurists could debate whether the Second Circuit correctly decided *Guzman* and whether *Booker* applies retroactively to Section 2255 motions. *Guzman*, however, is binding precedent in this Circuit. Moreover, every other Court of Appeals to consider *Booker*'s retroactivity has rejected arguments like Waksal's and concurred that *Booker* established a new non-watershed procedural rule. *See Cirilo-Munoz v. United States*, 404 F.3d 527, 533 (1st Cir. 2005); *Lloyd v. United States*, 407 F.3d 608, 612-15 (3d Cir. 2005); *In re Elwood*, 408 F.3d 211, 212-13 (5th Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 860 (6th Cir. 2005); *McReynolds*, 397 F.3d at 481; *Never Misses a Shot v. United States*, 413 F.3d 781, 783-84 (8th Cir. 2005); *United States v. Cruz*, 423 F.3d 1119, 1120-21 (9th Cir. 2005); *United States v. Price*, 400 F.3d 844, 845-49 (10th Cir. 2005); *Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir. 2005). Such resounding uniformity among the Courts of Appeals reveals that reasonable jurists are in agreement about *Booker*'s scope. Accordingly, Waksal's arguments do not merit this Court's encouragement to challenge *Guzman*'s holdings anew. *See Miller-El*, 537 U.S. at 336.

Waksal argues that, in deeming *Booker* to be non-watershed, the Court of Appeals "did not address the reasonable doubt 'aspect' of *Booker*, that is, the constitutional requirement . . . that fact-finding that increases a sentence above the statutory maximum be based on the most rigorous of evidentiary standards—proof beyond a reasonable doubt."

(Pet. Reply Mem. at 5.) However, Waksal's reading of the decision overlooks the Supreme Court's remedy and thus mischaracterizes the rule established by *Booker*. As the Seventh Circuit noted, "*Booker* does not in the end move any decision from judge to jury, or change the burden of persuasion. The remedial portion of *Booker* held that decisions about sentencing factors will continue to be made by judges, on the preponderance of the evidence, an approach that comports with the sixth amendment so long as the guideline system has some flexibility in application." *McReynolds*, 397 F.3d at 481; *see also Lloyd*, 407 F.3d at 615 ("It would be one thing if we were only dealing with Justice Stevens's opinion in *Booker*, which held the Federal Sentencing Guidelines unconstitutional because their mandatory nature required judges to find facts that increased sentences based on a preponderance of the evidence. But in the opinion authored by Justice Breyer, the unconstitutionality of the Guidelines was remedied by excising the provision . . . that made their application mandatory.").

Finally, Waksal contends that the particular circumstances of his guilty plea and sentencing make a strong case for retroactivity because his sentence was "purely driven by judicial fact-finding mandated by the Guidelines." (Petitioner's Memorandum in Support of Section 2255 Motion, dated Mar. 29, 2005, at 3.) He argues, "[W]hether *Booker* should be retroactively applied must be presented to the Second Circuit in the unique context of this case, involving a defendant who plead guilty without a plea agreement, without an agreement as to a Guidelines sentence, and without waiving his right to collaterally attack his sentence." (Pet. Reply Mem. at 3.) Indeed, Waksal submits that the very question "whether special or novel circumstances can allow for retroactivity in one case, but not another, is an issue of first impression that should be resolved by the appellate court." (Pet. Reply Mem. at 3.)

This Court disagrees. Nothing in *Booker*, *Guzman* or the decisions of the other Courts of Appeals rejecting a retroactive application of *Booker* permits a contrary result based on the individual circumstances of one petitioner's conviction and sentencing. In *Guzman*, for example, the Second Circuit examined *Booker* anticeptically, without regard to the petitioner before the Court. The Court of Appeals compared the remedy prescribed by the Supreme Court to the pre-existing federal sentencing regime and discerned a new procedural rule that lacked the rare hallmarks of a "watershed rule." *Guzman*, 404 F.3d at 143-44. That is, irrespective of the individual facts of the petitioner's case, the Court found no basis to "assume that the mandatory Guidelines *system* under which Guzman was sentenced seriously diminished the accuracy or fundamental fairness of the sentencing process." *Guzman*, 404 F.3d at 143-44 (emphasis added).

In any event, Waksal's conviction and sentencing do not call for revisitation of the Second Circuit's holding, for the relevant aspects of Waksal's case are indistinguishable from those of the petitioner in *Guzman*. In that case, the Second Circuit was confronted with a petitioner who had been sentenced pre-*Booker* after being convicted by a jury. *See Guzman v. United States*, 277 F. Supp. 2d 255, 257 (S.D.N.Y. 2003). However, for purposes of the Sixth Amendment in the sentencing context, a guilty plea unsupported by a plea agreement such as Waksal's presents the same issues as a conviction after a jury trial. In each scenario, a sentencing court operating in the pre-*Booker* regime applied the mandatory Guidelines after making its own findings by a preponderance of the evidence. The defendants in both scenarios neither stipulated to an appropriate sentence nor waived their right to challenge their sentences collaterally. Thus, for all intents and purposes, Waksal is identical to the many Section 2255 petitioners who were sentenced pre-*Booker* after being convicted by a jury.

Other courts in this District have faithfully applied *Guzman* and repeatedly denied certificates of appealability to petitioners who, like Waksal, had not entered a plea agreement with the Government. *See, e.g.*, *Mendez v. United States*, 379 F. Supp. 2d 589, 595, 599 (S.D.N.Y. 2005); *Thristino v. United States*, 379 F. Supp. 2d 510, 516-17, 520 (S.D.N.Y. 2005); *United States v. Ruiz*, No. 01 Cr. 864 (GEL), 2005 WL 1668614, at *9 (S.D.N.Y. July 14, 2005); *Moody v. United States*, No. 04 Civ. 8665 (SHS), 2005 WL 1606061, at *6 (S.D.N.Y. July 7, 2005); *Yuzary v. United States*, No. 04 Civ. 2809 (RPP), 2005 WL 926909, at *8 (S.D.N.Y. Apr. 21, 2005). Waksal has failed to make a substantial showing that this Court should treat his case any differently. Given the firm conclusion of the Second Circuit and every other Court of Appeals to consider the retroactivity of *Booker* to cases on collateral review, the question whether Waksal's Section 2255 motion should be denied is not debatable and does not warrant this Court's authorization to proceed up the appellate ladder.

Accordingly, this Court declines to issue Waksal a certificate of appealability.

CONCLUSION

For the reasons set forth above, Waksal's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 is denied. Moreover, because Waksal has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. The Clerk of the Court is directed to mark this case closed.

Dated: October 26, 2005
New York, New York

SO ORDERED:

/s/ _____
William H. Pauley, III
U.S.D.J.

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APPENDIX B

S.D.N.Y./NY NY
05-cv-3378
Pauley, J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed June 6, 2006]

05-6960-pr

SAMUEL WAKSAL,
Petitioner-Appellant,

v.

UNITED STATES,
Respondent-Appellee.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 6th day of June two thousand and six,

Present:

Hon. Robert D. Sack,
Hon. Robert A. Katzmann,
Circuit Judges
Hon. J. Garvan Murtha,
District Judge.*

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that Appellant's motion is DENIED and his appeal is dismissed

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* The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

because he has not made a "substantial showing of the denial of a constitutional rights." *See* 28 U.S.C. § 2253(c); *Guzman v. United States*, 404 F.3d 139 (2d Cir. 2005).

FOR THE COURT:

Roseann B. MacKechnie, Clerk
By: /s/ Lucille Carr

Jun 6 2006

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

[Filed Oct. 18, 2006]

Docket No. 05-6960-pr

SAMUEL WAKSAL,
Petitioner-Appellant,

v.

USA,
Respondent-Appellee.

Roseann B. MacKechnie
Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of Oct. two thousand six.

Present:

Hon. Robert D. Sack
Hon. Robert A. Katzman
CIRCUIT JUDGES,

Roseanne B. MacKechnie, Clerk
Hon. J. Garvan Murtha*
DISTRICT JUDGE

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* The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

A Motion for Reconsideration having been filed herein by pro se appellant Samuel Waksal,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is DENIED.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney